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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1411

ADELA NANCY DEL VALLE and
MORRY S. FOX, *Petitioners*

v.

UNITED STATES OF AMERICA, et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF OF ADELA NANCY DEL VALLE AND MORRY S. FOX

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TABLE OF CONTENTS

		Page
I.	The Court's Decision In This Case Should Reaffirm Its Previous Limitations On The Admissibility of Co-Conspirator Hearsay	1
II.	The Conspiracy Alleged And Proved Was Not Operating At and After The Hearsay Evidence of Subornation Admitted Against These Petitioners	4
III.	The Erroneous Admission Of The Concealment Evidence Was Prejudicial To These Petitioners .	8
CONCLUSION		10

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I. The Court's Decision In This Case Should Reaffirm Its Previous Limitations On The Admissibility of Co-Conspirator Hearsay.

In their opening brief Petitioners demonstrated that the Fifth Circuit clearly erred in its application below of the co-conspirator exception to the hearsay rule. That rule strictly limits admissibility of concealment hearsay, such as that which was admitted into evidence against Petitioners, to cases where there is evidence to show that the hearsay was *both* "in the course of" and "in furtherance of" the conspiracy *charged and proved. Krulewitch* v. *United States,* 336 U.S. 440

(1949); *United States* v. *Nixon,* 418 U.S. 683 (1974); Rule 801(d)(2)(E) Federal Rules of Evidence. Respondent's brief in opposition does not address the Fifth Circuit's broad and dangerous expansion of those acknowledged limitations. Instead, Respondent seeks to sustain the court below by characterizing its conclusion as "essentially factual." Respondent's Brief, page 6. We submit that the Fifth Circuit's conclusion was instead essentially fictional, and legally erroneous, in two critical respects:

First, to get around the fact that a conspiracy to conceal (by subornation or otherwise) was neither charged nor proved, and that therefore the subornation attempts were not "in furtherance of" the conspiracy charged, the court below fictionalized a "continuing sequence of objectives." The court's fiction did not require a showing by the Government that the "objectives" of the concealment hearsay were at any time agreed upon by the defendants or anywhere defined in the indictment or evidence. Indeed, the court itself never articulated what the "continuing sequence of objectives" were. Instead, the fictionalized "objectives" provided the vehicle for the court to improperly "find" an objective to conceal. Petitioners submit that this invention of a "continuing sequence of objectives" both ignores and dangerously expands this Court's oft-repeated limitation that co-conspirator hearsay be "in furtherance" of the "main" or "chief" objectives of

[1] This fiction, we submit, might equally support a prosecution attempt to show that petitioners' co-defendants had "put [ ] an incorrigible witness out of the way," *Krulewitch* v. *United States, supra,* 336 U.S. 456 (Jackson, J., concurring specially). Plainly, hearsay evidence of concealment by subornation or by murder should not be admissible unless shown to be in furtherance of the *actual* objectives of the conspiracy charged and proved.

the conspiracy charged. *Krulewitch* v. *United States, supra, Grunewald* v. *United States,* 353 U.S. 391 (1957); *Dutton* v. *Evans,* 440 U.S. 74 (1970); Rule 801(d)(2)(E), Federal Rules of Evidence.

Second, the Fifth Circuit fictionalized an "implied" and "necessary" conspiracy to conceal.[2] Under this fiction, the court below avoided the question of whether the subornation attempts were in furtherance of the main objectives of the conspiracy actually charged, because the court improperly found that these attempts were in furtherance of the "implied" conspiracy to conceal. Similarly, the court's use of an "implied-conspiracy-to-conceal" fiction allowed it improperly to ignore the lack of any substantial evidence that the conspiracy charged was ongoing at the time of the concealment attempts. *Nixon* v. *United States, supra; United States* v. *James,* 590 F.2d 575 (5th Cir. 1979) (*en banc*). As Petitioners have already shown, this Court has condemned the "implied conspiracy" theory of admissibility of co-conspirator hearsay. Brief, pp. 13-16. Petitioners emphasize here that, in addition to its incompatibility with this Court's decisions, the "implied" or "necessary" conspiracy created by the Fifth Circuit also fails because it lacks any *standard* for application. The fatal vagueness of the Fifth Circuit's theory is clear from the following passage:

[2] Petitioners have previously shown that the court's "implied conspiracy" theory rests upon the erroneous conclusion that since co-defendant Davis (the suborner) once concealed *his* deeds from the Florida State Bar Association, a conspiracy to conceal involving Petitioners is "necessarily" implied. There was never any charge or proof, however, that Petitioners agreed to conceal in any fashion, whether by subornation or otherwise. Indeed, there is no evidence to show that Petitioners were aware that the Association had conducted an investigation, much less that Davis had acted to conceal anything.

> "As this Court recognized in the *United States* v. *Diez,* [515 F.2d 892 (5th Cir. 1975)], concealment is *sometimes* a necessary part of the conspiracy, so that statements made solely to aid the concealment are in fact made during and in furtherance of the charge of conspiracy." See Appendix A, p. 9a. (Emphasis added.)

Petitioners submit that the twin fictions of (1) an endless and unarticulated "continuing sequence of objectives" and (2) a "necessarily implied" conspiracy to conceal eliminate the limitations established for the admissibility of co-conspirator hearsay in *Krulewitch* v. *United States, supra,* and carried forward in Rule 801(d)(2)(E) of the Federal Rules of Evidence. As the Second Circuit recently observed in *United States* v. *Lang,* 589 F.2d 92, 100 (1978):

> " 'The adoption of Rule 801(d)(2)(E) and the rejection of the Model Code—Uniform Rule approach [which would have eliminated the in furtherance requirement] should be viewed as mandating a construction of the "in furtherance" requirement *protective of defendants* particularly since the Advisory Committee was concerned lest relaxation of this standard lead to the admission of less reliable evidence.' " Quoting from Weinstein's *Evidence,* ¶ 801(d)(2)(E) [01] p. 801-147 (1977). (Emphasis added.)

II. The Conspiracy Alleged and Proved Was Not Operating At and After The Hearsay Evidence Of Subornation Admitted Against These Petitioners.

The prejudicial evidence that Petitioners' codefendants bribed or attempted to bribe potential grand jury witnesses was initially proffered by the prosecution under two theories: first, as evidence of the consciousness of co-defendant Davis' guilt, and second

under the co-conspirator exception. Brief, App., pp. 108a-109a.[3] With regard to the latter, the prosecution told the trial court it would later "connect up" this evidence with other evidence which it believed would show that the statements were made in the course of the conspiracy charged. Brief, App., 108a-109a, 118a.

The prosecution never succeeded, however, in "connecting up" the hearsay to the charge and the proof, as the following relevant dates show:

1. *January, 1976*: The date of the last overt act charged in the indictment and proved at trial.
2. *April 13, 1976*: Extensive search and seizure carried out at petitioners' place of business.
3. *May, 1976*: Petitioners' codefendants attempt to persuade potential grand jury witnesses to perjure themselves before the grand jury (*i.e.,* the concealment evidence objected to).
4. *August, 1976*: Petitioners indicted.

Thus, between January and August 1976 there is neither a charge in the indictment nor any indication in the evidence that Petitioners or their codefendants committed any overt act related to the conspiracy actually alleged. Lacking such evidence, under this Court's holding in *Fiswick* v. *United States,* 329 U.S. 211, 216 (1946), that the overt acts "averred and proved mark the duration" of conspiracy, the overt acts charged and proved against Petitioners and their codefendants must limit the duration of *this* conspiracy.

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[3] The second ground was almost an afterthought. As the prosecutor stated: "It may as well come under the co-conspiracy exception . . ." Brief, App., p. 108a.

Respondent, however, claims categorically that the "record shows that clients were still being solicited for the insurance fraud scheme in August 1976." Opposition p. 7 and n. 1. In their opening brief, at footnote 4, Petitioners pointed out that the prosecution presented absolutely no evidence to support this conclusion. Indeed, the witness upon whom Respondent erroneously relies for its conclusion testified that in preparing her testimony with the Government she could not even recall all of the events charged in the indictment, R. Vol. II, p. 347, much less speculate on incidents which were never charged. Further, the extensive search and seizure carried out at petitioner Fox's clinic on April 13, 1976, coupled with Respondent's inability to prove any overt acts occurring after January, 1976, establish that there was no perponderating evidence, much less "substantial, independent evidence," of a conspiracy ongoing after the seizure occurred. See *United States* v. *Nixon, supra,* 418 U.S. at 701 n. 14.[4]

[4] The "substantial, independent evidence" standard alluded to in *Nixon* was adopted as the substantive standard by the Fifth Circuit *en banc* in *United States* v. *James,* 590 F.2d 575 (1979). The single record excerpt quoted by Respondent in its opposition at page 7, note 1, is a vague statement which clearly fails to recite any facts which would constitute "substantial, independent evidence of a conspiracy, . . . enough to take the case to the jury." *United States* v. *Nixon, supra.* In their opening brief, at page 9, footnote 6, Petitioners noted that they contended in the Court of Appeals that the admissibility of the attempted concealment evidence should have been a matter for judicial determination under Rule 104(a) rather than a question of relevance and conditionally admissible under Rule 104(b), Federal Rules of Evidence. In that connection, they observed that the Fifth Circuit itself was entertaining that question *en banc* in *United States* v. *James,* 576 F.2d 1121 (5th Cir. 1978), *motion for rehearing en banc granted* (August 7, 1978). On February 12, 1979, the Fifth Circuit *en banc* decided *James,* 590 F.2d 575, and confirmed that the trial court must determine the admissibility of co-conspirator hearsay before it is heard by the jury and may admit that evidence only where there is substantial, independent evidence to show that the hearsay was both in furtherance of and in the course of the conspiracy alleged. 590 F.2d at 3260-3261. While the Rule 104(a) determination was made prospective, Petitioners contend that the standard of admissibility merely confirmed what this Court had said (in dicta) in *United States* v. *Nixon, supra.* In any case, even under the lower standard of perponderance, Respondent cannot show that the hearsay evidence of subornation was in furtherance and in the course of the conspiracy charged and proved.

Perhaps even more significant, during the instruction conference prior to submitting the case to the jury the *prosecution* requested that the jury be instructed that the concealment evidence could be considered only as evidence of Petitioners' codefendants' consciousness of guilt under Rule 803 of the Federal Rules of Evidence. (R. Vol. 10, p. 2089). This request reflects the prosecution's admission that it had failed to show how the proffered concealment evidence was in furtherance of and in the course of the conspiracy charged and proved. In addition, this admission by the prosecution contradicts Respondent's contention here that there is record evidence to show that the conspiracy was in operation at the time of the concealment attempts.

Petitioners contend with respect to the duration issue that the prosecution's misgivings were correct; that the prosecution failed to "connect up" the concealment evidence with any proof that the conspiracy lasted through the period of attempted concealment; and that Petitioners' counsel in the trial court below was unequivocally correct when he observed that the concealment information (available to the prosecution months before the return of the indictment but

produced to Petitioners' counsel only moments before its presentation at trial), ". . . should have been included as a part of one of the schemes or a part of the conspiracy itself. . . ." if the Government intended to convict Petitioner with such evidence. Brief, App., pp. 114a. Having failed to allege it or prove it, Respondent should not be allowed to condemn Petitioners with it.

III. The Erroneous Admission Of The Concealment Evidence Was Prejudicial To Petitioners.

In their opening brief, at Appendix E, pp. 107a-131a, Petitioners have set forth the evidence of subornation and attempted subornation of grand jury witnesses undertaken by Petitioners' codefendants. Respondent in its opposition brief at p. 7, says that "[a]t all events, Petitioners are most unlikely to have suffered any prejudice" as a result of this evidence having been admitted for consideration against them.[5] Our opening brief demonstrates in detail why the improperly admitted concealment hearsay produced these petitioners'

[5] The legal issues presented by their Petition do not require or permit detailed reply to the factual inaccuracies recited in Respondent's Opposition, which seeks to avoid those issues by coloring the facts in favor of its backpeddling theory of "harmless error." Petitioners do wish to point out, however, that the Government's case depended on exploiting Petitioners' legitimate association with co-defendant Davis; that Mary Hamilton (the Government's chief witness) testified that she was unaware of any receipt by Fox of any "cash payments"; that the $10,000 "cash payment" was actually repayment of a preexisting medical bills; and that Petitioner Del Valle did *not* "cooperate" with her, but instead *refused* several requests by Ms. Hamilton to "inflate" medical bills. *Cf.*, Respondent's Brief, pp. 2-3, *with* R. Vol. 2, pp. 338-355. Further, the Florida State Bar Association investigated the practices of co-defendant (and concealer) Davis, *not* the practices of Dr. Fox. Indeed, the record does not show that Dr. Fox was ever even *aware* of the Association's investigation of co-defendant Davis. *See* footnote 2, *supra*.

convictions. Brief, pp. 19-20. Plainly, such blatant jury-tampering as the hearsay revealed must have weighed heavily on the minds of the jurors judging the innocence of these Petitioners, particularly since the government's case against them rested almost exclusively upon Petitioner's prior (and legitimate) business association with the co-defendant who attempted the subornation.

To reach its "harmless error" conclusion, Respondent ironically relies upon the fact that Petitioners were "not mentioned in the disputed testimony. . . ." Opposition Brief, p. 7. Petitioners submit that it is precisely because they were *not* mentioned that the testimony is inadmissible against them and particularly prejudicial to them. Indeed, it is precisely because Petitioners had no role in or reason to anticipate subornation attempts that they endeavored to exclude this evidence from the jury's consideration in determining their innocence in the conspiracy actually charged. The instructions given by the trial court allowed the jury to consider this damning concealment hearsay evidence against these Petitioners regardless of the fact that they had not been mentioned in or connected with the disputed testimony.[6] Finally, the prosecutrix in her argument for the conviction of Petitioners made re-

[6] Respondents' opposition seeks to leave the impression that the trial court gave limiting ("cautionary") instructions with regard to the use of the co-conspirator hearsay evidence to which Petitioners repeatedly objected at trial. The instructions, however, were the stock instructions which simply required the jury to first conclude that Petitioners were members of the conspiracy charged before considering the co-conspiratory declarations. Plainly, if the co-conspirator declarations themselves were not in furtherance of or in the course of the conspiracy charged and proved, this instruction itself should not have been given.

peated references to the concealment hearsay. (R. Vol. X, pp. 1909, 1930-1931).

Petitioners submit that the hearsay evidence of subornation "conditionally" admitted here was erroneously admitted; was never connected up; condemned these Petitioners as co-suborners in the eyes of the improperly-instructed jury; and gives rise to grave doubt as to whether that testimony had a "substantial influence in bringing about" the jury's verdict. *Krulewitch* v. *United States,* supra, 336 U.S. at 444.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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